IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No. 994 of 1999
With
CIVIL APPLICATION No. 4044 of 2002
In
CIVIL REVISION APPLICATION No. 994 of 1999

For Approval and Signature:

HONOURABLE MR.JUSTICE C.K.BUCH

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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KANTILAL & BROTHERS - Applicant(s)

Versus

PRAGJI PARSHOTTAM'S HEIR & 1 - Opponent(s)

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Appearance :
MR MEHUL S SHAH for Applicant(s) : 1,MR SURESH M SHAH for Applicant(s) : 1,
MR AR THACKER for Opponent(s) : 2.2.1, 2.2.2, 2.2.3,2.2.4
MS BALA R THACKER for Opponent(s) : 2.2.1, 2.2.2, 2.2.3,2.2.4

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CORAM : HONOURABLE MR.JUSTICE C.K.BUCH

Date : 04/10/2005

COMMON ORAL JUDGMENT

1. Heard learned counsel appearing for the parties.

2. The present Revision Application is filed against the order dated 15th April, 1999, passed below application Exh.85 by the ld.Joint Civil Judge (S.D.), Kutch at Bhuj, in Regular Civil Suit No.373 of 1989, whereby the learned Judge has rejected the request of the orig.plaintiff to join heirs and legal representatives of the deceased defendant no.2. The ld.Presiding Judge dismissed the application accepting the submissions made by the contesting defendants mainly based on the decision of the Apex Court reported in AIR 1982 SC 676. The learned Judge has quoted the relevant part of the cited decision and held that the abatement takes place automatically on the death of a party and unless a specific order to set aside the order of abatement is passed and that too, on the written request, the heirs and legal representatives cannot be brought on record and, therefore, the application deserves to be rejected. Of course, the ld.Presiding Judge has accepted that even on the death of the defendant, the cause of the

suit survives and the pliantiff was otherwise entitled to continue with the suit. The thrust of the order is that the application was not preferred in the prescribed period of limitation and no formal prayer to get the abatement set aside was made in the application.

3. The second resistance placed by Ms.Bala Thacker, learned counsel appearing for the respondents, before the Court is with respect to sustainability of the present Revision Application and it is argued that the petitioner ought to have approached this Court by way of an appeal under Order 43 Rule 1 (K) of the Code of Civil Procedure because the rejection of the application Exh.5 amounts to rejection of request to set aside the abatement. So the order under challenge is a composite order under Order 22 Rule 4 and Order 22 Rule 9 of the Code of Civil Procedure and when the Order 43 Rule 1(K) of the Code of Civil Procedure provides for an appeal against the order under Order 22 Rule 9 of the Code of Civil

Procedure, the present Revision Application should be rejected.

4. The application Exh.85 has been filed on 12nd July, 1998 for joining the heirs of the deceased defendant no.2. The death of defendant no.2 was declared by the learned counsel representing the defendant on 31st March, 1998. It is prayed that as there was summer vacation between 12th May, 1998 and 14th June, 1998, and further the advocates were on strike upto 30th June, 1998, no substantive progress was made by the plaintiff and, therefore, the heirs of the deceased defendant no.2 may be joined as party defendants. It was simultaneously prayed that if it is found that there is any delay, the same may be condoned. One of the contentions in the application is that the plaintiff's advocate was not shown the Pursis Exh.83, whereby the death of the defendant no.2 was declared. So the application was under Order 22 Rule 4. It is true that on the date of death, the proceedings against the deceased have been abated but it

can survive if the cause survives and if the heirs and legal representatives of the deceased are joined as party in a prescribed period of limitation.

5. In response to the query raised by the Court, Ms.Bala Thacker has fairly accepted that the ratio of the decision in the case of ***Patel Lallubhai respondent. v. Shankarbhai K., reported in 1995(1) GLH 576,*** would help the present petitioner. I would like to reproduce the relevant observations for the purpose of present order, where this Court (Coram : R.A.Mehta, J) has held that :

> “1. ... The original plaintiff had expired on 22.10.1989 and the application was made on 9.3.1990. It is not disputed that the plaintiff's Advocate had written a letter on 21.2.1990 to the original plaintiff and it was only then that the heirs learnt about the institution of the suit.

> Within about 17 days of that knowledge, the application was made. It is true that there is no specific prayer for setting aside the abatement, but there is a prayer that the application for bringing heirs was made beyond 90 days and, therefore, a request was made for condonation of delay and for bringing heirs on record. This application could have been and should have been construed liberally and with ends of justice in view and not with any hyper-technicality."

6. It would be beneficial to refer to the observations made by this Court in the decision in the case of ***Matuben Sundarji Sejpal v. Anantbhai Tekchand, reported in 36 (1) GLR 351,*** whereby this Court has held that :

> "4. ... If an application for setting aside the abatement is made, question

is whether an application for setting aside an abatement only can be filed without an application for stating the names of the heir of the deceased-defendant to be brought on record ? In my opinion, the answer is no, because simple application for setting aside an abatement without an application for bringing the heirs on record is of no avail or value, as on setting aside the abatement in absence of heir, the same process of abatement again will become operative because heirs are not brought on record. Therefore, filing of an application for bringing heirs on record of the deceased-defendant impliedly conveys or states that the applicant wants to set aside the abatement and to bring heirs on record. In the instant case, application for bringing heirs on record is filed within the period contemplated under

the law for setting aside abatement and, therefore, there was no question of condonation of delay as within the period of 60 days on expiry of 90 days of the demise of the party, the application for setting aside abatement can be filed. Therefore, there was no question of filing an application for setting aside abatement, but Court should have read a prayer for setting aside abatement."

7. The learned Single Judge while dealing with the case reported in Matuben (supra) has referred to one decision in the case of ***Mohatta Bros. v. Chaturbhaidas Chimanlal and others, reported in 1992 (1) GLR 585***. This Court was dealing with the very provision of the Code of Civil Procedure and has observed that :

"In my opinion, the argument is of a hyper-technical nature. Sub-rule(3) of

Rule 9 of Order 22 in terms states that after the expiry of the period of sixty days prescribed by sub-rule(2) of Rule 9, an application can be filed invoking the provisions of Sec.5 of the Limitation Act. It is in cases where an application under Sec.5 of the Limitation Act is contemplated. There is no provision for condonation of delay in making the application for setting aside the abatement except the provisions found in Order 22 Rule 9 of the Code. If no application is made within a period of ninety days under Order 22 Rule 4(1) of the Code, the suit abates as against the deceased defendant by virtue of sub-rule(3) of that Rule. Such an abatement can only be set aside by resorting to the procedure laid down in Rule 9 of that Order. If the application for setting aside the abatement is made within

sixty days from the date of abatement, that application would be governed by sub-rule (2) of Rule 9 of Order 22 but if the application is made after the period of sixty days has expired, the plaintiff can apply under sub-rule(3) read with Sec.5 of the Limitation Act for setting aside the abatement and on the abatement being set aside, the Court would be empowered to allow the application under Order 22 Rule 4(1) of the Code. Therefore, the only procedure which the plaintiff can follow after the suit has abated under Order 22 Rule 4(3) is that which is set out in Rule 9 of that Order. An application under Sec.5 of the Limitation Act can be made only after the suit has abated and a period of sixty days from the date of abatement has elapsed. Such an application can only be to set aside the abatement on sufficient cause being

shown by the plaintiff. Therefore, the contention of Mr.Trivedi that since there is no specific prayer in the application made under Sec.5 of the Limitation Act for setting aside the abatement, it cannot be construed to be an application under sub-rule(3) of Rule 9 of Order 22 is a hyper-technical one and unsustainable."

8. So it is the consistent view of this Court as well as the Apex Court that if the cause survives, then a litigation should not be permitted to die and the endeavour should be of doing substantive justice. When a party is to be joined in a litigation like Civil Suit, then normally the application should be signed by the concerned party; especially when a pleading is required to be amended. But as per the settled legal position, the advocates are authorised to join and are entitled to sign the miscellaneous proceedings and the applications which are not

of substantive nature. The correction in the cause title cannot be equated with the amendment made in the pleading and such application can be signed by a lawyer but if the facts are controverted in such application by the otherside then the party advocate can be asked to tender an affidavit in support of the contentions of the application signed by him.

9. Filing of an application either under Order 22 sub-rule (3) or sub-rule (4) to bring the heirs and legal representatives on record, when cause survives so that the Suit can continue, is a formal application without seeking any substantive pleading. Such applications cannot be equated with applications under which a supplementary proceedings are being drawn by a party in the main Suit. It is also not obligatory that such application should be filed by the plaintiff only. Any of the parties can inform the Court about the death of a party to the Suit and in absence of controversy or formal

resistance from the otherside as to the names of the proposed heirs who are legal representatives, the Court can pass an order to implead such proposed party substituting the party died pending litigation. This basic principle which has been considered by the Court centres around the ratio of the decision of this Court in the case of Patel Lallubhai R. (supra). The order under challenge is passed by magnifying technical objection raised by the otherside. The rejection is based on the fact of declaration made vide Pursis Exh.83 and referring to the ratio of the decision in the case of judgment reported in AIR 1982 SC 676, it is observed by the Apex Court that :

> “It may be mentioned that no specific order for abatement of a proceeding under one or the other provision of Order 22 is envisaged, the abatement takes place on its own force by passage of time. In fact, a specific order is

necessary under Order 20 Rule 9 C.P.C. for setting aside the abatement."

10. Mr.S.M. Shah, learned counsel appearing for the petitioner, has drawn my attention to one decision of the Apex Court in the case of K.Rudrappa v. V. Shivappa, reported in AIR 2004 SC 4346. In the cited decision, the appellant before the Supreme Court was the son of one appellant fighting a litigation for allotment of land by the Government in he District Court in the State of Karnataka. There were two claims of same parcel of land but the claim of the father of the appellant before the Supreme Court was rejected by the Tehsildar and, therefore, the father of the appellant had challenged the said decision before the District Court by way of an appeal being Misc. Appeal No.51 of 1990. Pending appeal, the father of the appellant expired on 13th June, 1994 and the say of the appellant was that he was not aware about the pendency of Misc. Appeal before the District

Court Simoga. When he received letter from the advocate in the month of September, 1994, he came to know about pendency of the litigation and immediately informed the advocate as to the death of his father, original appellant before the District Court. The application in turn was made on 20th December, 1994, under Order 22 Rule 3 r/w. Section 152 of the Code of Civil Procedure. The District Judge rejected the application on 08th April, 1996 holding that the application filed by the son, the appellant before the Supreme Court was time barred and no prayer for setting aside the abatement had been made nor the application for condonation of delay was filed. Because of rejection of the application, the son of the deceased appellant again made application in the year 1996 for setting aside the abatement, condonation of delay and bringing heirs of the deceased appellant on record. But the Court rejected the prayer on 24th August, 2002. The appellant before the High Court being a heir of deceased

appellant preferred Revision Application before the High Court but the High Court rejected the application observing that no grounds were made out by the petitioner to admit the Revision Application. Thereafter, the appellant approached the Apex Court raising grievance against the order passed by the Courts below and alleging that the rejection by the High Court is by a cryptic unreasoned order. After hearing the learned counsel for the parties, the Supreme Court observed that the High Court ought to have interfered with the order passed by the District Courts under Section 115 of the Code of Civil Procedure. I would like to reproduce relevant para:10 of the said decision for the sake of brevity and convenience, where the Apex Court has held that :

> “10. ...In our opinion, the appeal deserves to be allowed. The case of the appellant before the District Court was that he was not aware of the pendency

of the appeal filed by his father against the order passed by the Tehsildar. The father of the appellant came to know about pendency of appeal somewhere in September, 1994 when he received a communication from the advocate engaged by his father. Immediately, therefore, he contacted the said advocate, informed him regarding the death of his father and made an application. In such circumstances, in our opinion, the learned counsel for the appellant is right in submitting that a hypertechnical view ought not have been taken by the District Court in rejecting the application inter alia observing that no prayer for setting aside abatement of appeal was made and there was also no prayer for condonation of delay. In any case, when separate applications were made,

they ought to have been allowed. In our opinion, such technical objections should not come in doing full and complete justice between the parties. In our considered opinion, the High Court ought to have set aside the order passed by the District Court and it ought to have granted the prayer of the appellant for bringing them on record as heirs and legal representatives of deceased Hanumanthappa and by directing the District Court to dispose of the appeal on its own merits. By not doing so, even the High Court has also not acted according to law."

11. It is also necessary to mention that the Apex Court while dealing with Civil Appeal arising out of the Special Leave Petition (Civil) in the case of K. Rudrappa (supra) has referred to one decision in the case of Ganeshprasad Badriprasad Lahoti (deceased) by LRs. v. Shivprasad Jamnadas Chorasiya and otehrs, decided by the

Apex Court on 16th August, 2004. In the case of Ganeshprasad (supra) also the prayer to bring heirs on record was rejected on the ground that there was no prayer for setting aside the abatement of appeal nor condonation of delay but the Apex Court ultimately reversed the finding and allowed the application. In both the cases, the Apex Court has rejected the technical objections holding that ***such technical objections should not come in the way of doing justice (Emphasis applied for the purpose of present order).***

12. For short, the present Civil Revision Application is required to be allowed and, therefore, the same is hereby allowed. The order under challenge is hereby quashed and set aside. The petitioner is directed to make necessary amendment in the plaint/cause title be carried out forthwith.

So far as present Civil Revision Application is concerned, Rule is made absolute accordingly and Civil Application No.4044 of

2002 stands infructuous since this Court has already issued fresh Rule on 27th June, 2005 and hence, the same is disposed of accordingly.

(C.K. Buch, J)

Aakar